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Before the
FEDERAL COMMUNICATIONS COMMISSION
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Policies and Rules Governing Interstate Pay-Per-Call and Other Information Services Pursuant to the Telecommunications Act of 1996	)	CC Docket No. 96-146

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Policies and Rules Implementing the Telephone Disclosure and Dispute Resolution Act	)	CC Docket No. 93-22

COMMENTS OF PILGRIM TELEPHONE, INC.

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EXECUTIVE SUMMARY

Comments of Pilgrim Telephone, Inc.

In its comments, Pilgrim demonstrates that the rule revisions proposed by the Commission are at odds with the language of the statute and clear Congressional intent. Congress has adopted a new system of regulating the pay per call industry, that differs significantly from past attempts. These new requirements were the result of careful and lengthy deliberations. Structurally, the statutory amendments create a new two tier exemption from the billing restrictions related to providing information services over toll free numbers. The Commission has failed to properly consider and tailor rules that meet the new Congressional direction.

In addition, the proposed rule revisions would significantly disrupt a vast number of carrier offerings, and are at odds with the manner of offering services in a highly competitive industry that is increasingly relying on electronic commerce. Adoption of effective rules will require the Commission to abandon much of the prior regulatory structure, and to enact new rules that recognize the new structure adopted by Congress.

Many of the problems that are of concern to Congress and the Commission can be better addressed by focusing on some of the structural deficiencies in the communications industry and Commission regulations, such as the unavailability of 900 blocking information, problems in the provisioning and availability of billing and collection services, and the monopoly of the local exchange carriers over billed name and address.

The Commission must make an effort to identify all of the different services and dialing patterns that are likely to be affected by the proposed rules, so that the full impact of the rules on all of the services offered by carriers and service providers will be properly assessed. Any rule revisions need to be drafted in a manner that does not create a competitive advantage for any class of carriers or providers, and ensures a level playing field for all competitors. New rules should also be drafted in a manner to narrowly effectuate Congressional intent, without precluding consumer access to new and innovative services which they desire.

Pilgrim details a number of carrier offerings that are likely to be adversely impacted, or prohibited, by the proposed rules. Pilgrim then make specific rule revision proposals which it believes properly addresses Congress' concerns.

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COMMENTS OF PILGRIM TELEPHONE, INC.

Pilgrim Telephone, Inc. ("Pilgrim"), by and through its attorneys, hereby files its comments with the Federal Communications Commission ("Commission") in response to the Commission's request for comments on its proposed rules.[1]

I. INTRODUCTION

Pilgrim is an interstate interexchange carrier ("IXC") providing common carrier services pursuant to tariffs on file

[1] Policies and Rules Governing Interstate Pay-Per-Call and Other Information Services Pursuant to the Telecommunications Act of 1996, CC Docket No. 96-146, Order and Notice of Proposed Rule Making, FCC 96-289, released July 11, 1996 ("NPRM").

with the Commission.[2] Pilgrim offers a variety of common carrier services including 1+ (where available), collect calling, 0+ (generally via 800 number access), and teleconferencing services. Pilgrim also provides a number of enhanced and/or information services, including specialized teleconferencing, voice mail, voice store and forward and information or entertainment services.

Pilgrim's enhanced and information services are provided over a variety of dialing patterns permitted under the Commission's rules. Consumers may pay for the services by using their telecommunications carrier calling card, whether issued by Pilgrim or any other nationally recognized carrier, credit card, or in some instances, by 900 number access.

While Pilgrim may be substantially impacted by the rules proposed by the Commission in the NPRM, Pilgrim is not alone in this respect. In fact, many services not usually considered "information services" will be equally impacted by these rules, and the delivery of important new services could be stifled. As proposed, the rules set forth in the NPRM will apply to enhanced services, including dial tone and CLASS services, and offerings accessible over N11, 800 and other exchanges. The breadth of the proposed rules, and the wide sweeping impact the proposed rules will have, demand that the Commission revisit the delicate achieved by Congress. The Commission must use its

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[2] Pilgrim Tariff F.C.C. No. 1., effective March 7, 1995, and previous versions.

resources, information and authority to make appropriate and measured changes in light of the Congressional balancing, reform dysfunctional aspects of the underlying carrier numbering and information access system and protect interstate services which operate in compliance with the Commission's rules from state interference.

II. GENERAL COMMENTS ON SCOPE AND IMPACT OF RULES

In order to properly protect the rights of consumers in reasonable access to enhanced and information services without unreasonable interference, the rules to be adopted by the Commission should be content neutral, and properly recognize the balancing of interests achieved by Congress. Several aspects of the NPRM and the proposed rules should concern participants in this proceeding, and consumers that desire access to information and enhanced services delivered via telecommunications.

A. Focus on Content of Communications

The Commission adopted the NPRM largely in response to Congressional action. As evident from references made during Congressional deliberations and in previous Commission orders, some members of Congress and the Commission have focused on "adult services" when considering information services. Congress carefully avoided a specific mandate relating to content, and Pilgrim believes that neither Congress nor the Commission has the power to distinguish between adult services and other information services when considering and applying these rules. Significant First Amendment concerns may come into play if content is considered, especially if the underlying information or entertainment is provided by independent third parties. The Commission should be cautious to analyze and apply the consumer protections mandated by Congress in a content-neutral manner.

These concerns can arise both directly and indirectly. Careless comments by the Commission, or more dangerous actions by the Commission, indicating voluntary or participatory collusion between billing local exchange carriers ("LECs") and the Commission to restrict or deny billing and collection options otherwise permitted under law clearly would involve state action and raise constitutional concerns.[3] The Commission must work to ensure that the local exchange carriers ("LECs") and other parties providing billing and collection services to IXCs and information service providers provide such services on an equal and nondiscriminatory basis, independent of the nature of the service provided.

In addition to being constitutionally improper, a narrow content or service focus would also cause the Commission to ignore the wide and growing variety of enhanced and information services which are not adult in nature, but which would clearly be equally impacted by the rules proposed by the Commission in the NPRM. The proposed rules will apply equally to

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[3] See, e.g., NPRM at 4, para. 9. LECs "voluntarily" participated in discontinuance of billing.

all information, enhanced and entertainment services, regardless of the underlying information or entertainment, and service or content. The Commission must recognize and consider that there is no difference between "enhanced" and "information" services so that the full impact of any rules can be properly assessed.

B. Appreciation of the Delicate Balance Achieved by Congress

The Commission and the parties to this proceeding must also carefully consider the delicate balance adopted by Congress with the passage of the amendments to Section 228 of the Communications Act. While Congress lifted the tariffed services exemption from the definition of pay-per-call, it has not mandated that all information and entertainment services be provided exclusively over 900 numbers. Neither has it adopted a requirement that all requests for access to information services be made in writing, or even in advance.

Instead, Congress created a new regulatory structure which permits more flexibility for carrier and provider development and offering of dialing and billing patterns for information and entertainment services. These are reflected in the two independent methods of access to and billing for information services provided over toll free numbers in place of the one method previously allowed. Coupled with this increased flexibility, Congress has adopted more stringent requirements for the provision of detailed information to be provided to consumers prior to purchase. The Commission must be mindful of specific

Congressional instructions when adopting rules in response to Congressional action.

C. Service Migration; Deficiencies in Traditional 900 Blocking System as Primary Underlying Cause of the Problems

The Commission correctly acknowledges that unscrupulous information service providers are likely to migrate to other exchanges to avoid the restrictions in the statute and the rules, but this is only one part of the reason for migration to other dialing and billing patterns. The deficiencies and unreasonable costs associated with 900 service provision and access, competition between service providers and carriers and the rapid evolution of electronic commerce are even stronger reasons.

As there are many incentives to migrating to other dialing patterns, any attempt to anticipate and identify every possible dialing pattern that may be used by information providers, and adopting rules that may apply to those dialing patterns, is destined to failure. Not only can the Commission not anticipate all future dialing patterns, any attempt to apply rules like these to every dialing pattern will only cause inadvertent restrictions on legitimate uses of those dialing patterns. Pilgrim opposes, therefore, extension of the toll free dialing restrictions to other non-toll free dialing patterns.

As part of a comprehensive solution, the Commission should recognize that access to 900 blocking request information, and mandated accessing of that information prior to connection, is the only way to adequately address dialing pattern migration, and to permit all parties to honor the blocking requests of consumers. The Commission should open up access to 900 blocking information as a primary means of addressing the abuse issues raised by many parties in prior proceedings. The Commission should also attempt to address the primary deficiencies of 900 number service -- unreasonably high costs and lack of portability.

D. Application of Rules to Other Local Exchange And IXC Offerings, Including N11

In the debates before Congress, analysis in the NPRM, and in prior proceedings before the Commission, the fact "toll free" numbers include much more than simply 800 service is generally ignored. The Commission should recognize all "toll free" exchanges, and must explicitly recognize that all restrictions that apply to 800 and other numbers generally recognized to be toll free apply by definition to a wide variety of dialing patterns and offerings, including local exchange offerings and N11. This recognition and application is required to comprehensively and properly provide the consumer protection mandated by Congress, and to maintain a level competitive playing field for all carriers and service providers.

To assist the Commission and parties in understanding the scope of services which are "toll free," and the probable impact of the proposed rules on these services, Pilgrim submits a few for the Commission's consideration.

(1) Dial tone services. While normally not thought of as information services, innovations such as voice command dialing services have created a whole new group of information and enhanced services provided over a dialing pattern widely perceived to be toll free, even though charges apply. These services will be available for the provision of services which are as subject to possible consumer abuse as others traditionally cited by the Commission.

(2) Custom calling and CLASS services. Star code, custom calling and CLASS services, while widely perceived to be toll free but for which charges apply, are certainly information services which should be subject to similar rules. These services are offered by LECs and IXCs alike.

(3) Paging and Alarm Monitoring. These services are increasingly offered over the phone, and provisioned over the phone. Whenever offered on an interstate basis, which most are to some extent, they would become subject to these rules.

Not only must these rules be uniformly applied to all information services, but the Commission is required by Congress to extend the rules to all services necessary to properly protect consumers. The above listed services, and many others, will have to be offered by written presubscription, or through the use of a calling card or credit card, under the Commission's proposed rules. The current practice of offering many of these services over the telephone, which is a major convenience for consumers, will have to come to an end.

It is vitally important to recognize that many of these services are provided by LECs. In considering the application of any written or presubscription requirement, the Commission must also consider the natural advantage that LECs have, due to management of the billing and collection database. The LECs have a natural monopoly over access to consumer information, and a natural monopoly over the ability to contact all consumers. LECs should not be permitted to sign up consumers over the telephone by leveraging their ability to send monthly bills to all consumers in their service territory.

In the alternative, the LECs should be required to make all caller information and billing services available to all carriers and service providers, on a real time and competitively content and service neutral basis. Requiring LECs to provide billing and collection to all competitors for information services, if the LEC itself offers information services, will help establish and maintain a competitively neutral and level playing field.

E. Application of the Per Se Interrelationship Finding of the Commission

In paragraph 48 of the NPRM, at page 20, the Commission tentatively finds that

> any form of remuneration from that carrier to an entity providing or advertising the service, or any reciprocal arrangement between such entities, constitutes per se evidence that the charges levied actually exceeds the charge for transmission.

The expansive expression of this finding causes a wide variety of information services as offered by LECs and IXCs to immediately become subject to this per se finding. LECs offer a wide variety of information services, including time and weather and other services referenced in Pilgrim's Reply Comments in Docket No. 93-22, for which the LECs advertise. As the LEC is both the advertiser and the provider of the transport to the service, each instance in which a caller is charged on their bill for transport or access to one of these numbers would constitute a per se violation of the Commission's rules. Therefore, direct dialing to these numbers would be effectively prohibited.

Many other common dialing and compensation arrangements would also be prohibited. Carriers commonly offer compensation payments in the form of commissions, terminating switch access arrangements (TSAAs) and other payments to aggregators, universities, hospitals, motels and airports. Many carriers also issue calling cards through affinity programs which provide for commission arrangements to the card issuers, and provide incentives for card issuers to stimulate calling to a variety of numbers, including information services. To the extent that any of these parties provide information and stimulate calling which results in a charge on a caller's bill, the information provision and billing arrangement would also constitute a per se violation of the proposed rules.

F. Interstate Character of Offerings and Level Playing Field Requirements Necessitate Preemption

The Commission should also recognize the essentially interstate nature of most information services, and explicitly find that all services available on an interstate basis are subject to Commission jurisdiction. Beyond this fact, uniform enforcement of any rules requires that these rules apply to all services, even those that are intrastate in nature. Otherwise, it will be easy for parties to evade these rules by switching to an intrastate platform. In addition, such failure will create an unreasonable competitive advantage between LECs and IXCs.

As most of these services are interstate in nature, the Commission should expressly preempt any attempt by the states to extend their authority over interstate offerings. One example of state interference with interstate offerings is a statute adopted in Minnesota two years ago.[4] The Minnesota legislature decided to prevent the issuance of any calling cards over 800 telephone lines, even when the subscription process takes place on an interstate basis. This statute, and others likely to be under consideration in other states, interfere with interstate commerce, and will interfere with the careful balancing of interests sought by Congress. The Commission should take steps to ensure the integrity and uniformity of interstate rules.

III. INTENT AND PURPOSE OF CONGRESSIONAL AMENDMENTS

Congressional intent in the consideration and adoption of the amendments to Section 228 of the Act is clear, both from the express language of the amendments, and from the legislative history. It is apparent from a review of both that Congress intended to strike a delicate balance between competing interests to which the Commission must remain true.

A. The Balance Achieved by Congress

Congress has established a new scheme of protection,

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[4] Minn. Stat. § 325 F.692, subd. 10 (1994). (Attachment A.)

which is different from previous attempts to regulate this industry in several important aspects. The balance which Congress sought attempted to meet several goals simultaneously -- (1) close loopholes which permitted deceptive trade practices and other abuses under the prior rules; (2) permit greater options for consumers and service providers; (3) recognize the current trends in electronic commerce and service provider competition; and (4) require more advance disclosure of information to permit more informed decision making by consumers, while not imposing onerous demands on the industry.

The amendments to the Act set forth in the legislation made at least five specific choices, they -- (1) eliminated the tariffed services exemption which had existed under prior law; (2) rejected the need for a prior signed agreement to permit billing for information services over non-900 numbers; (3) permitted even more options for the provision and billing of information services, and even further departure from the requirement that all such calls should be made over 900 numbers; (4) permitted even greater 800 number usage for access and billing; and (5) required more disclosure of price and terms and conditions of service, either in advance or in writing.

B. Alternative Billing Methods

In a significant departure from prior law, and in conjunction with the removal of the tariffed services exemption, Congress adopted two different alternative methods for billing information services accessed over 800 numbers. These two methods are comprised of presubscription agreements, which carry significantly different and very detailed definition from prior law or Commission rules, and calling cards. Congress also added an explicit definition of calling cards into the statute which is also different from that under prior law and Commission rules. For each of the two methods, Congress adopted very different detailed requirements which indicates a balancing and tradeoff between the two methods.

1. Presubscription

For the presubscription billing method, Congress specified that a written agreement be delivered to the customer before charges are incurred by that customer. Congress intended that the extensive notice provisions of subsection 8 would be contained in the written agreement,[5] that a prominent disclaimer would be included on the local phone bill and that a confidential personal identifying number ("PIN") would be used to prevent unauthorized use by anyone who had not received the explicit written agreement. Congress specifically discarded the concept

[5] Congress defined "written agreements" to include agreements transmitted electronically, and therefore, does not require a traditional "written" agreement. Pilgrim believes that so long as an agreement originates in writing and can be reduced to writing, the transmission is irrelevant. Methods permissible under this approach would certainly include written notice transmitted by facsimile, but would also include those transmitted by electronic mail and bulletin board posting. Pilgrim believes that the definition could also encompass the reading of the written agreement to a blind person.

of requiring execution of this written document by the customer in favor of detailed advance notification of the terms and conditions of service.

2. Calling Cards

With the adoption of the second exception, permitting calling cards and other charging methods, Congress specifically deleted any advance element and also deleted any requirement of notification in writing, and hence, execution of a written agreement. Specifically, Congress knew and intended that the presubscription method be linked with the burden of an advance element and an electronic/written element, but did not impose the advance or written agreement requirements when customers choose to pay for information or enhanced services with a calling card.

The fact that no writing and no preexisting agreement is required for delivery of services to be billed to calling cards is clear from a review of Senator Harkin's discussion reported in the June 14, 1995 Congressional Record.[6] In explaining the two means of accessing information services over toll free numbers, the Senator observed that "this Amendment would clarify that a preexisting agreement must be in writing ... alternatively it would allow information service on 800 numbers without a preexisting agreement."[7]

Pilgrim notes that in exchange for deletion of the

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[6] ___ Congressional Record, S8358 (1995). (Attachment B.)

[7] Id., emphasis added.

writing and preexisting arrangement requirements, Congress imposed a substantial notification requirement in advance of each call. The tradeoff that is evident from the Congressional language is that carriers can either assume the burden of providing advanced written notice of all the rates, terms and conditions, or provide more immediate access but be required to provide advance notification prior to charges being levied on each call.

It is further apparent that Congress specifically rejected the notion that calling cards require any kind of document, even a card. The language of the statute itself is explicit when it states that "calling card means an identifying number or code unique to the individual that is issued to the individual by a common carrier." So long as a code or number is issued by a common carrier which results in charges to the telephone number of the caller, regardless of the location of call origination, the Congressional definition of calling card and use of this exemption is satisfied. No other writing or advance subscription is required.

3. This Dual Option Recognizes and Seeks to Avoid Interference With Current Trends in Telephony

Congress was aware that in the telecommunications industry carriers are increasingly relying on instant or near instant issuance of calling cards over the telephone without any other writing or documentation, including, in some cases, no physical cards ever being issued. Documents provided by MCI to Senator Harkin's staff during the drafting of the language demonstrated that MCI clearly issued instant calling cards.[8] In addition, MCI provided information to the Minnesota legislature indicating that many carriers issued instant calling cards and arguing that Minnesota law was preempted by federal law and otherwise interfered with interstate commerce.[9]

Pilgrim has also obtained evidence of 800 number calling card issuance, with almost instant activation and sometimes with the option of not receiving a card, from a number of carriers including Pacific Bell, USWest, AT&T and Southwestern Bell. In some cases, the carrier relies on ANI as an essential element in the calling card issuance process.

Pilgrim submits that Congress intended to protect callers from unwanted charges on toll free calls, but did not intend to prevent or delay the levying of such charges when the transaction is willingly entered into by the calling party. Specifically, Congress did not intend to prevent, or interfere with, consumers making an informed instant and electronic choice to be charged.

It is apparent from the language of the statute, and the restrictions which were considered and rejected by Congress,

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[8] See Attachment C.

[9] Comments of Mr. Barry Tilley of MCI to Minnesota House Regulated Industries and Energy Committee, March 28, 1994. (Statute at Attachment A.) As noted further below, the Commission should preempt interstate application of inconsistent state laws that disrupt this comprehensive federal scheme.

that Congress rejected a system of pre-billing restrictions on calling cards in favor of a system of per-call notification, entry of a specific number or code and post billing consumer protections. Congress intended to ensure that a caller would understand when a toll free call would become a charged call, by requiring disclaimer messages and entry of a calling card number, but specifically rejected a requirement that all such calls require a preexisting agreement. Congress also intended to ensure that toll free callers know when they are choosing to incur a charge, but did not intent to prevent consumers from making that choice both easily and rapidly.

4. Carrier Assumption of Risk as an Additional Consumer Protection

The balance struck by Congress evidences a recognition that so long as a carrier who issues a calling card is willing to assume the risk of non-collection, and other credit risks associated with the issuance and acceptance of calling cards for the purchase of information services, that consumers could be adequately protected. Carrier assumption of this credit risk, in conjunction with the advanced notification of the terms, conditions and pricing of the services on every call, and the special billing requirements for information services, gives consumers substantial notification and post billing protection.

As proper consumer protection was achieved, Congress clearly determined that it should not otherwise interfere with the carrier's business choice. To the extent that further restrictions were debated and defined in detail, or rejected by Congress, the Commission should not attempt to add those requirements into its rules on its own motion.

C. Further Analysis of Legislative History Clearly Supports an Interpretation That Execution of Written Agreements is not Required

The original House version of the bill did not provide for the use of calling cards and other methods of payment in addition to presubscription agreements, and specifically required that any presubscription agreement not only be in writing, but also be executed by the party to be charged prior to being used. This provision was specifically not included in the Senate version, and was deleted from the final version of the law.

It appears that Senator Harkin and Representative Gordon sought to amend current law to mandate that the previously required "pre-existing agreement" fulfill its original intent: full disclosure of rates, provider information, and payment methods. They included the "exceptions" in light of concerns that a more onerous predicate of a signed written document would be impractical and legally unpersuasive. See MCI Position Paper (written documents not practical "since customers frequently will not take the time to sign and return" them; and written documents "provide[] less proof of legal competence ... than does having a credit card or checking account").[10] Congress was also concerned that an executed agreement provision might also prevent the

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[10] See Attachment B.

contemporaneous purchase of merchandise with a credit card. See Floor Statement of Sen. Harkin, at S 8357 (stating that the original law included the option of a pre-existing agreement out of "concern that the provision might be read to prevent people [from] buying merchandise with a credit card on an 800 number").

Sen. Harkin and Rep. Gordon thus sought to amend the law to require (a) a pre-existing agreement coupled with disclosure of rates, provider information, and payment methods in writing, or (b) verbally informing the caller of the same information, with acceptance of the charges through the provision of a credit or calling card number to which the charges may be billed. See Document titled "Toll-Free Dialing Protection."

Senator Harkin believed that this dual modification was sufficient to "close the loop-hole on phone sex peddlers." See Floor Statement of Senator Harkin, Congressional Record at S8358. The Senator sought to put an end to the practice whereby a preexisting agreement was "initiated by pressing a button on the phone." Id. at 8357-58. The difference, therefore, between the bogus presubscription that Congress sought to prohibit, and the acceptance of a calling card, is that consumers pushing a digit or a button may not know they are about to be charged, but all consumers should know that the entering of a calling or charge card number will result in a charge, even if the card is not issued in writing.